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APPENDIX I

2011-1366

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

**Appeal from the United States District Court
for the District of Delaware in
Case no. 08-CV-0862,
Judge Leonard P. Stark**

**OPENING BRIEF OF
PLAINTIFF-APPELLANT LEADER
TECHNOLOGIES, INC.**

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Because a party must prove invalidity by clear and convincing evidence, an accused infringer must prove that a prior use or offer for sale met each and every claim limitation through clear evidence “such as memoranda, drawings, correspondence, and testimony of witnesses.” *Sonoscan, Inc. v. Sonotek, Inc.*, 936 F.2d 1261, 1263 (Fed. Cir. 1991) (quoting *RCA Corp. v. Data Gen. Corp.*, 887 F.2d 1056, 1060 (Fed. Cir. 1989)). But Facebook offered no testimony, expert or otherwise; no source code; no technical documents; and no memoranda or correspondence from the time period in question that supported its position that the Leader2Leader product suite satisfied all of the claim limitations for all of the asserted claims before December 11, 2002.

In sharp contrast, Facebook did at least attempt to prove on an element-by-element basis, through expert

testimony, that certain *other* prior art references, consisting of 261 pages of evidence, anticipated the '761 patent. *See, e.g.*, JA25847-75; JA27239-55; JA34698-728; JA34729-38; JA34955-5159. The jury correctly rejected that anticipation defense. Having done so for the other prior art, the jury could not have reasonably found a prior use or offer for sale on even less evidence.

Facebook's inability to prove its case on the statutory bars was not for lack of trying. Facebook had *every* version of the Leader source code in its possession because the district court ordered Leader to produce them. JA7074. If Leader2Leader had actually embodied the '761 invention in 2002, which it did not, Facebook could and presumably would have paraded that code down Main Street and elicited expert testimony on an element-by-element basis. The only logical inference to draw from Facebook's lack of Leader source code or other technical evidence at trial is that it knew that the source code confirmed that Mr. McKibben's and Mr. Lamb's testimony was correct and Facebook was wrong.

Technical proof was especially important in this case because the asserted claims relate to highly technical back-end components of a software system. *See p. 7, supra.* Only source code and related technical documents would reveal the inner workings of Leader2Leader and whether it handled and stored data in the manner claimed using the necessary back-end components, including, for example, claim 1's context and tracking components. *See* JA256-57. Likewise, for claim 9, Facebook was required to prove that the 2002 version of Leader2Leader was capable of dynamically updating metadata. *See* JA257. Without the source

code, Facebook could not do so. As a final example, dependent claim 32 requires storage of metadata in a storage component that facilitates many-to-many functionality. *See* JA258. Without reviewing the source code, it would be impossible to know whether the metadata or something else facilitated that functionality. When the subject matter includes structural components of a computer program, the source code is arguably the only way to ascertain these

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any particular point in time. *See, e.g., United States v. Weaver*, 267 F.3d 231, 245 (3d Cir. 2001); *Walton v. Halter*, 243 F.3d 703, 709-10 (3d Cir. 2001). At most, the jury might have viewed Mr. McKibben's uncertainty during his deposition as a reason to discredit and disregard his trial testimony. But again, a finding that Mr. McKibben was not credible would leave Facebook with *no* evidence, expert or otherwise, supporting its position. Facebook's attack on Mr. McKibben's credibility cannot mask its lack of actual evidentiary support.

The district court also construed two of Leader's interrogatory responses "as an admission that the invention was ready for patenting prior to the critical date." JA55. But the interrogatory responses say nothing about whether Leader2Leader included the patented technology before December 11, 2002.

Facebook's interrogatories stated: "For each claim of the '761 patent that [Leader] contends *is* practiced by

any product(s) and/or service(s) of [Leader], identify all such product(s) and/or service(s) and provide a chart identifying specifically where each limitation of each claim *is* found within such product(s) and/or service(s).” JA34951 (emphases added); *see also* JA34946. Because Facebook used the present tense and did not specify any other timeframe, Leader responded in kind by naming the products that embodied the ‘761 patent claims *as of the date of the interrogatory (in 2009)*. JA25713-15. In relevant part, Leader answered, in the present tense, that “Leader2Leader® powered by the Digital

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motion for new trial); *see also Georgia-Pacific Corp. v. United States*, 264 F.2d 161, 166 (5th Cir. 1959) (same). At a bare minimum, therefore, this Court should remand for a new trial on the public-use and on-sale bars.

CONCLUSION

This Court should reverse and remand for entry of judgment as a matter of law or, at a minimum, a new trial.

Respectfully submitted on this 25th day of July 2011.

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